

THE HONORABLE JOHN C. COUGHENOUR

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

MARYLIN TAYLOR,

Plaintiff,

v.

DULCIE O'SULLIVAN, et al.,

Defendants.

CASE NO. C13-1479-JCC

ORDER

This matter comes before the Court on Defendant's motion to dismiss (Dkt. No. 11) and Plaintiff's motion to strike (Dkt. No. 10), motion for default (Dkt. No. 12) and motion for default judgment (Dkt. No. 13). Having thoroughly considered the parties' briefing and the relevant record, the Court finds oral argument unnecessary and hereby GRANTS Defendant's motion to dismiss without prejudice, DENIES Plaintiff's motions to strike and for default, and terminates Plaintiff's two other motions (Dkt. Nos. 19, 20) for the reasons explained herein.

**I. BACKGROUND**

On August 19, 2013, Plaintiff filed a motion for leave to proceed *in forma pauperis*. (Dkt. No. 1.) Magistrate Judge Tsuchida granted the motion and recommended that the complaint be reviewed under 28 U.S.C. § 1915(e) before issuance of summons. (Dkt. No. 3.) After reviewing the complaint, which made state-law claims and claims under 42 U.S.C. §§ 1983 and 1985, this Court dismissed the complaint on September 16, 2013, for failing to provide any details about

1 the alleged violations. (Dkt. No. 6.) Plaintiff was granted leave to amend within twenty days.  
2 (*Id.*)

3 On October 10, 2013—three days after the Court’s deadline for amending—Plaintiff filed  
4 an Amended Complaint. (Dkt. No. 8.) The Amended Complaint states claims for breach of  
5 contract and negligence, and also refers to the First Amendment and Fourteenth Amendment.  
6 (Dkt. No. 8.) Defendants have moved to dismiss under Fed. R. Civ. P. 12(b)(6) for failure to state  
7 a claim.

## 8 **II. DISCUSSION**

### 9 **A. Pleading Standard and Leave to Amend**

10 A party may move to dismiss a complaint that fails to state a claim upon which relief can  
11 be granted. Fed. R. Civ. P. 12(b)(6). To survive a motion to dismiss, a complaint must contain  
12 sufficient factual matter, accepted as true, to state a claim for relief that is plausible on its face.  
13 *Ashcroft v. Iqbal*, 556 U.S. 662, 677–78 (2009). A claim has facial plausibility when the plaintiff  
14 pleads factual content that allows the court to draw the reasonable inference that the defendant is  
15 liable for the misconduct alleged. *Id.* at 678. A claim that fails to present a “cognizable legal  
16 theory” or sufficient facts to support a cognizable claim will be dismissed under Rule 12(b)(6).  
17 *Johnson v. Riverside Healthcare Sys., LP*, 534 F.3d 1116, 1121 (9th Cir. 2008).

18 A court should “freely give” leave to amend “when justice so requires.” Fed. R. Civ. P.  
19 15(a)(2). “Dismissal without leave to amend is appropriate only when the Court is satisfied that  
20 an amendment could not cure the deficiency.” *Harris v. Cnty. of Orange*, 682 F.3d 1126, 1135  
21 (9th Cir. 2012).

### 22 **B. Motions to Strike and for Default**

23 Plaintiff argues that all submissions from Defendant’s attorneys must be stricken because  
24 they did not ask this Court’s permission to intervene under Fed. R. Civ. P. 24. (Dkt. No. 10.) But  
25 Rule 24 governs intervention by third parties, not submissions from a party’s attorneys. Attorney  
26 Vanessa Lee has made all submissions for Defendants and she properly entered her notice of

1 appearance. (Dkt. No. 9.) The Court therefore denies Plaintiff's motion to strike.

2 Plaintiff also moves for entry of a default judgment on the basis that Defendants have  
3 failed to defend the lawsuit. But Defendants timely filed a motion to dismiss, which tolls the  
4 deadline for Defendants to file an answer to the complaint. *See, e.g., Sample v. O'Hara*, 481  
5 Fed.App'x 319, 320 (9th Cir. 2012). The Court therefore denies Plaintiff's motions for a default  
6 and a default judgment.

7 **C. Procedural Irregularities**

8 Defendants state briefly that Plaintiff's Amended Complaint should be dismissed because  
9 it was filed late. (Dkt. No. 11 at 5.) Defendants do not argue that they have suffered any  
10 prejudice, and the Ninth Circuit has recognized that "[c]ases should be decided upon their merits  
11 whenever reasonably possible." *Eitel v. McCool*, 782 F.2d 1470, 1472 (9th Cir. 1986). Plaintiff is  
12 proceeding *pro se* and filed the Amended Complaint only a few days late. Without condoning  
13 this delay, the Court nevertheless recognizes that it is preferable to proceed on the merits so  
14 declines to dismiss on this basis.

15 Plaintiff, in turn, argues that Defendants' motion to dismiss was procedurally deficient  
16 because the legal assistant who mailed it accidentally failed to include her name next to the "s/"  
17 on the signature line. (Dkt. No. 19.) Plaintiff does not suggest that she did not receive the motion  
18 to dismiss. Neither does she argue that she was prejudiced by the omission of the name on the  
19 signature line. (Dkt. No. 19.) The legal assistant has filed an affidavit affirming that she mailed  
20 the motion to dismiss. (Dkt. No. 18.) As noted above, there is a strong preference to deciding  
21 cases on the merits, so the Court will consider Defendants' motion.

22 **D. Failure To State A Claim**

23 Plaintiff's Amended Complaint states two causes of action: breach of contract and  
24 negligence. Her factual allegations, however, fail to suggest that there was a contract or that there  
25 was any conduct that might be interpreted as the existence of a contract. With no evidence of a  
26 contract, Plaintiff has failed to adequately plead breach of contract. Similarly, Plaintiff's

1 allegations of negligence merely gesture at unspecified “errors and omissions,” a failure “to  
2 conform to the standard of care,” and “a breach of the standard of care and trust.” (Dkt. No. 8 at  
3 3.) Her factual allegations mention “calibration data and results” but there is no suggestion about  
4 what the data was and the relationship between Plaintiff and Defendants. Even reading Plaintiff’s  
5 complaint generously, it fails to describe facts that are sufficient to state a claim for either breach  
6 of contract or negligence.

7 Although not styled as causes of action, Defendant’s Amended Complaint also accuses  
8 Defendants of “making false accusations and otherwise unlawfully conspir[ing] against Plaintiff .  
9 . . with the result that criminal proceedings were wrongfully initiated in order to discourage  
10 Plaintiff[’s] political activity and other protected First Amendment conduct.” (Dkt. No. 8 at 1–2.)  
11 Plaintiff further alleges that these actions were intentionally discriminatory in violation of the  
12 Fourteenth Amendment. (*Id.*) There is no description of what criminal proceedings were initiated  
13 or what “political activity and other protected First Amendment conduct” was discouraged.  
14 Plaintiff states that the defendants had a goal of having Plaintiff arrested, but it is not clear from  
15 the Amended Complaint whether Plaintiff was actually arrested. Plaintiff’s opposition motion  
16 (Dkt. No. 16) also suggests an arrest, but provides no facts about when, where, or on what basis  
17 she was arrested, or how the defendants were related to any arrest. There is no also no indication  
18 about how or whether these allegations are related to the factual allegations concerning  
19 “calibration data.”

20 In short, Plaintiff’s Amended Complaint fails to state a claim upon which relief may be  
21 granted. Plaintiff has already been granted leave to amend once. But Plaintiff’s Amended  
22 Complaint includes more detail than her original complaint and includes allegations that could,  
23 in theory, be properly supported with additional facts. Particularly in light of her *pro se* status,  
24 the Court is unconvinced that further amendment would be futile. *See Lopez v. Smith*, 203 F.3d  
25 1122, 1130 (9th Cir. 2000) (denial of second leave to amend was improper in part because  
26 plaintiff was proceeding *pro se*). Plaintiff is therefore granted leave to amend a second amended

1 complaint by January 10, 2014. Plaintiff is reminded that, even though she is proceeding *pro se*,  
2 she must nonetheless comply with deadlines established by this Court. If no amended complaint  
3 is filed by that date, or if the allegations do not remedy the deficiencies identified in this order,  
4 the matter will be closed.

5 Plaintiff has filed two other submissions which are styled as motions. (Dkt. Nos. 19, 20.)  
6 These appear to repeat some of the arguments in the motions that the Court has dismissed. It is  
7 unclear whether they may also contain requests that would be relevant if Plaintiff files an  
8 adequate complaint. In light of this dismissal without prejudice, the Court terminates these  
9 pending motions. (Dkt. Nos. 19, 20). If Plaintiff files an adequate complaint, then Plaintiff can  
10 request to re-note either or both of these motions and the Court will consider them at that time.

### 11 **III. CONCLUSION**

12 For the foregoing reasons, Plaintiff's motions to strike and for default and default  
13 judgment are DENIED. (Dkt. Nos. 10, 12, 13.) Defendant's motion to dismiss (Dkt. No. 11) is  
14 GRANTED without prejudice. Plaintiff must file any amended complaint by January 10, 2014.  
15 The Clerk is respectfully directed to terminate the other pending motions. (Dkt. Nos. 19, 20.)

16 DATED this 20th day of December 2013.

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John C. Coughenour  
UNITED STATES DISTRICT JUDGE